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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. AUSTIN ROBERT RISTAINO, Defendant and Appellant.	E069487 (Super.Ct.No. INF1502032) OPINION

APPEAL from the Superior Court of Riverside County. Charles Everett Stafford, Jr., Judge. Affirmed.

John Patrick Dolan for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and A. Natasha Cortina and Alan L. Amann, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Austin Robert Ristaino, entered a plea of guilty to the court to mayhem (count 1; Pen. Code, § 203),[1] assault by means of force likely to cause great bodily injury (count 2; § 245, subd. (a)(4)), and misdemeanor battery (count 3; § 242). Defendant additionally admitted he personally inflicted great bodily injury upon the victim in his commission of the count 2 offense. (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8).) The court sentenced defendant to an aggregate term of six years of imprisonment. On appeal, defendant contends the court erred in failing to follow the proper procedural steps before denying defendant's request for probation. We affirm.

I. FACTS AND PROCEDURAL HISTORY[2]

On November 27, 2015, an officer was dispatched to a residence regarding a family disturbance between Mary Ristaino and her son Mark.[3] The officer spoke with Mary at a detached home at the rear of the residence. Mary said she owned the main house and was in the process of evicting Mark from it. The officer discussed the eviction process with her and informed her how to obtain a restraining order or criminal protective order if needed.

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[1] All further statutory references are to the Penal Code.

[2] The parties stipulated the preliminary hearing transcript would provide the factual basis for defendant's plea. We take our factual recitation from the preliminary hearing transcript.

[3] Mark is defendant's father and codefendant, but is not a party to this appeal.

The officer spoke with Mark, who was belligerent and "exhibited obvious symptoms of . . . being under the influence of alcoholic beverage[s]." The officer told Mark to stay on his side of the house and sober up for the day. Mark asked the officer to arrest Mary for trespassing since he said he was renting the main house; he said Mary needed to remain in the guest house; the officer declined Mark's request. As the officer left, he heard Mark yell, "'Mexican, stay on this side of the house.'"[4]

The victim testified the police had been called because Mark and his son, defendant, did not want the victim at the residence. The victim lived in New Mexico, but was visiting Mary for Thanksgiving.

About 45 minutes later, the officer was again dispatched to the home in response to a call by Mark, who reported that the victim was making threats against him. When the officer arrived, he noted that Mark had become more inebriated; Mark said he was not going to stay on his side of the house; he would go wherever he pleased. Mark said the victim had threatened him, but would not indicate what specific threats the victim had made. The officer left.

The victim testified Mark kept arguing with him about Mary's money and wanted to fight with him. Defendant obtained Mary's vacuum; James, the victim's son, testified he told defendant he was not supposed to use the vacuum. Defendant lifted the vacuum and threw it on the ground repeatedly until it broke. James told defendant he was glad

[4] The officer testified he believed the victim, Mary's fiancée, was Hispanic.

defendant's car had been keyed. Defendant came toward James and hit him twice in the face, causing him to fall.

James went to the main house and told the victim defendant had hit James in the face. The victim told defendant he could be put in jail for hitting James. Defendant started chest bumping the victim and slammed him into a door. James testified that defendant "was hitting [the victim] with both of his fists left and right like 50 or 60 times nonstop for three to four minutes. [The victim] fell to his knees, and [defendant] was still hitting him."[5] Mark joined in as both he and defendant repeatedly kicked the victim while he was on the ground. James testified Mark and defendant were "almost beating him to death."

James attempted to pull defendant off his father, but was not strong enough to do so. Mary told defendant he was going to kill the victim. James called the police. James's brother shouted that the police were coming. Defendant and his father stopped beating the victim and fled in separate vehicles. James testified the victim was twitching, his face was swollen, and he "was all bloody and his eyes were shut from the sw[elling]."

The officer arrived at the residence for a third time that day, this time with four other officers. He found the victim on the ground, in the backyard, lying motionless, covered in blood. There was a significant amount of blood smeared around the patio. Another officer took photographs, which were admitted into evidence. The victim was

[5] The victim testified he could not remember anything that happened after he fell.

going in and out of consciousness. An ambulance arrived to transport the victim to the hospital.

The officer went to the hospital where the victim's treating nurse informed the officer the victim was bleeding in the brain in two different locations, both his orbital sockets were broken, he was hemorrhaging in his sinus cavity, his lower dental implants had been knocked out, he had a lumbar fracture, and had multiple facial fractures. The next morning the officer went to the hospital and took photographs of the victim.

The victim awoke in the hospital where he stayed for seven days and underwent surgery. He had sustained seven facial fractures and a broken nose. The victim still needed to have teeth replaced. He also sustained continuous memory loss due to his injuries.

The victim was 62 years old at the time of the incident. Defendant was 19.

The People charged defendant by felony complaint with mayhem (count 1; § 203), assault by means of force likely to cause great bodily injury (count 2; § 245, subd. (a)(4)), and battery with the infliction of serious bodily injury (count 3; § 243, subd. (d)), and misdemeanor willful injury to a child (count 4; § 273a, subd. (b)). The People additionally charged defendant with personal infliction of great bodily injury upon the victim in his commission of the counts 2 and 3 offenses. (§§ 12022.7, subd. (a), 1192.7,

subd. (c)(8).) Count 1 named only "a human being" as the victim; counts 2 and 3 named the victim; count 4 named "John Doe" as the victim.[6]

Defense counsel submitted a pre-plea assessment dated June 15, 2016, by Milt Sheetz, a former probation officer. During Sheetz's interview with defendant, defendant "stated that the victim was partially responsible for much of the tension leading up to the altercation." Defendant reported that once the fight started, defendant feared for his life and was defending himself, first against James and then against the victim. Sheetz noted three factors affecting whether the case was unusual in that the court should consider granting probation despite the statutory presumption against doing so: (1) that defendant participated in the crimes under circumstances of great provocation, coercion, or duress; (2) the crimes were committed because of a mental condition; and (3) defendant was young and had no prior criminal record. Sheetz opined that if granted felony probation, defendant would not likely reoffend.

In a pre-plea probation officer's report, the probation officer recommended the court deny probation. The probation officer noted that in an interview after being arrested, defendant blamed James for vandalizing his car. Defendant stated James started the fight; defendant denied punching James. Defendant said James tried to kill him. Defendant, who was 19 years old, six feet tall, and 180 pounds, said he was in fear for his life from the victim. Officers noted defendant accepted no responsibility for the attack

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[6] The rational inference of the complaint and the preliminary hearing is that "John Doe" was James.

and was "'completely callous as he displayed no remorse about the heinous crime he committed.'"

The probation officer noted that circumstances in aggravation included that the offense involved great violence and great bodily harm; the victim was particularly vulnerable, and the offenses could constitute hate crimes.[7] The probation officer found no mitigating circumstances, but noted defendant's youth and lack of a criminal record. The probation officer noted defendant was ineligible for probation unless it could be found an unusual case. She additionally observed defendant expressed an unwillingness to pay restitution to the victim.

By felony information the People charged defendant with the offenses and allegations to which he pled, specifying that "the victim" was the victim of all three counts. On July 5, 2017, defendant pled to the sheet as recounted above. On August 25, 2017, the People filed a sentencing memorandum in which they argued defendant was unsuitable for probation and should be sentenced to eight years of imprisonment. On August 30, 2017, the victim and his son appeared in court to give victim impact statements. On September 21, 2017, the People filed a supplemental sentencing memorandum noting that defendant was presumptively ineligible for probation and that the court should deny him probation.

[7] This was due to Mark's command to the victim, "'Mexican, stay on this side of the house.'"

At the hearing on November 3, 2017, the court indicated it had reviewed the pre-plea probation officer's report, the People's sentencing memorandum, and the pre-plea report by Sheetz. It noted it had just been given a folder by defendant's counsel containing a letter from Judge William McVitie, a psychological evaluation report conducted by Hilda Chalgujian, and an unofficial student transcript for defendant,[8] all of which the court had reviewed. The court heard argument from defense counsel.

Thereafter, the court heard the testimony of Chalgujian, who said she had treated defendant since June 2012, and had prepared the 24-page report regarding her impressions and work with defendant.[9] Chalgujian testified regarding defendant: "I have never seen interactions in any of his reports or his demeanor that he had any propensity for violence." She further noted that defendant showed no propensity for violence in any of the testing she had done with him: "We talked about anger management after the incident because it was such an uncharacteristic behavior from this pretty docile, laid back, quiet individual." "This was not something that was a concern, as I said, until this incident where—it was mind boggling it had taken place."

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[8] None of these documents appear in the record on appeal. (*People v. Garcia* (2018) 29 Cal.App.5th 864, 871 [it is well settled that defendant has the burden of providing an adequate record on appeal for review]; *People v. Forest* (2017) 16 Cal.App.5th 1099, 1108, fn. 5.)

[9] Again, the report is not part of the record on appeal. Nowhere during her testimony did Chalgujian testify regarding her qualifications for treating defendant, though she is referred to by defense counsel as a "doctor."

Chalgujian noted defendant had made efforts to obtain an MBA and become a certified public accountant, which "shows that he is not this [monster] that he is being made out to [b]e." The incident "was very atypical on the part of this youngster. To my knowledge, I've known him a long time, he has never exhibited any ang[ry] outburst, let alone violence." Chalgujian observed that defendant's car had been keyed badly, which had cost him a significant amount of money to have fixed. When confronted with James saying he was glad he did it, it set defendant off and defendant just reacted.[10]

Chalgujian testified defendant was "very worried that this man was in [a] coma for days. I remember he was traumatized by the whole thing. And they were on hands and knees, hoping and praying that he would come out of the coma." When the victim was unconscious in the hospital, defendant "was in utter distress talking about it and crying about it." Defendant "acknowledged that he was the one who started this by pushing and shoving. He was there in that area of the house following his notice that there was some kind of bottle thrown by the father, and some comment that he was there to clean that up to . . . make sure that there was nothing there, no traces that could be destructive to anybody else." "There was some shoving and pushing that was going on. He started with James. And then the grandfather, the boyfriend of the mother, came into the act and

[10] The implication that James was responsible for the keying of defendant's vehicle, in addition to being hearsay, is not supported by the record that defendant stipulated would provide the factual basis for his plea. In fact, James testified that he was not the individual responsible for keying defendant's vehicle.

postured against [defendant], and [defendant] went after [the victim]." Defendant admitted kicking the victim once.

Sheetz testified and recommended that defendant receive either probation or the mitigated term of imprisonment. He had prepared a supplemental report dated September 27, 2017.[11] Sheetz noted defendant had graduated college and had been accepted into an MBA program. The offenses involved an isolated familial incident stemming almost exclusively from the toxic environment between the two households. Sheetz opined that the fact that defendant grew up in a very toxic, alcoholic home and suffered from extreme symptoms of codependency supported a grant of probation.

The court admitted into evidence photographs of the victim's face taken while he was in the hospital. Defense counsel argued the court should grant defendant probation because the offenses were unusual for defendant and the incident was unlikely to reoccur; defendant had been provoked, had no record of prior violence, had expressed remorse, and was young.

The court noted: "Unusual circumstances have been thrown around during this hearing. Unusual circumstances sufficient to put the defendant on probation. The testimony that I heard last week from the defense somewhat misses the point because it leaves a part of this case totally out, and asks me to find unusual circumstances on what the defendants have done since the incident without really looking into the reasons why

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[11] This report is not a part of the record on appeal either. It does not appear the court below even received the supplemental report.

the incident happened." The court noted that: "When a court is determining whether or not there's an unusual circumstance, there has to be an evaluation of the totality of the circumstances, not just the focus on the defendant . . . ." "But here I have a 62-year old man who has over $150,000 in medical bills, who had multiple bones broken in his head. The orbital sockets on both—the two orbital sockets were fractured, teeth were knocked out. He needed reconstruction surgery for his teeth. He's still suffering from that attack, and I have no ability whatsoever of making him whole." The court found defendant was the aggressor.

After reviewing all the filings, testimony, and argument, the court found that it could not "find . . . unusual circumstances in this case . . . ." Thus, the court denied defendant probation and imposed the midterm on both the principal and concurrent counts.

II. DISCUSSION

Defendant contends the court failed to follow the proper procedure in considering and rejecting his request to be found eligible for and granted probation. Hence, defendant maintains the matter must be reversed and remanded for the court to engage in the proper procedure. We disagree.

"Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons: [¶] . . . [¶] (3) Any person who willfully inflicted great bodily injury . . . in the perpetration of the crime of which he or she has been convicted." (§ 1203, subd.

(e)(3).) "If the defendant comes under a statutory provision prohibiting probation 'except in unusual cases where the interests of justice would best be served,' or a substantially equivalent provision, the court should apply the criteria in (c) to evaluate whether the statutory limitation on probation is overcome; and if it is, the court should then apply the criteria in rule 4.414 to decide whether to grant probation." (Cal. Rules of Court, rule 4.413(b).)[12] Rule 4.413(c) lists such factors as whether the willful infliction of great bodily injury in the case is "substantially less serious than the circumstances typically present in other cases"; whether the "defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense"; whether the "crime was committed because of a mental condition not amounting to a defense"; and consideration of the defendant's age and criminal record.

"Under rule 4.413, the existence of any of the listed facts does not necessarily establish an unusual case; rather, those facts merely 'may indicate the existence of an unusual case.' [Citation.]" (*People v. Stuart* (2007) 156 Cal.App.4th 165, 178, italics omitted.) "If a court determines the presumption against probation is overcome, it evaluates whether or not to grant probation pursuant to California Rules of Court, rule 4.414. However, 'mere suitability for probation does not overcome the presumptive bar . . . . [I]f the statutory limitations on probation are to have any substantial scope and effect, "unusual cases" and "interests of justice" must be narrowly construed,' and rule

[12] All further references to rules are to the California Rules of Court.

4.413 'limited to those matters in which the crime is either atypical or the offender's moral blameworthiness is reduced.' [Citation.]" (*Ibid.*)

"The trial judge's discretion in determining whether to grant probation is broad. [Citation.] '[A] "'decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge."'"' [Citation.] '[T]hese precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.' [Citation.] Generally, '"'[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'"' [Citation.]" (*People v. Stuart, supra*, 156 Cal.App.4th at pp. 178-179.) "'California courts have long held that a single factor in aggravation is sufficient to justify a sentencing choice . . . .' [Citation.]" (*People v. Quintanilla* (2009) 170 Cal.App.4th 406, 413.)

Here, defendant complains that the court failed to consider the first step in determining whether probation would be appropriate in the instant case: whether defendant's case was unusual such that the court should consider granting probation. However, the court expressly indicated that it was considering whether defendant's case was unusual. The court noted thrice that defendant had argued unusual circumstances,

permitting the court to consider granting probation. Relevant to the appropriate inquiry, the court observed: "[H]ere I have a 62-year old man who has over $150,000 in medical bills, who had multiple bones broken in his head. The orbital sockets on both—the two orbital sockets were fractured, teeth were knocked out. He needed reconstruction surgery for his teeth. He's still suffering from that attack, and I have no ability whatsoever of making him whole." Thus, the court implicitly found that defendant's crime was not "substantially less serious than the circumstances typically present in other cases." (Rule 4.413(c).) Moreover, the court found that defendant was the aggressor; thus, it found that defendant had not "participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense." (*Ibid.*)

The court's findings were within its discretion. According to the preliminary hearing transcript, which defendant stipulated would provide a factual basis for the plea, defendant, who was 19 years old at the time of the incident, initiated violence against James, who was 16 years old, simply because James told him he was glad defendant's car had been keyed after defendant intentionally broke Mary's vacuum cleaner. Defendant then initiated the beating of the 62-year-old victim over the fact that the victim informed defendant he could go to jail for hitting James. Thus, the court's implicit determination that defendant did not commit the offenses "under circumstances of great provocation, coercion, or duress not amounting to a defense" was within its discretion.[13]

[13] Sheetz's contention the offenses were committed under circumstances of great provocation, coercion, or duress was not supported by any alleged facts or evidence. Chalgujian's assertion the offenses were committed under circumstances of great

The beating involved defendant hitting the victim 50 to 60 times nonstop for three to four minutes. Defendant continued hitting the victim when the victim fell to the ground. While on the ground defendant began repeatedly kicking the victim, along with his father. The witnesses feared defendant was beating the victim to death. Defendant ceased beating the victim only when informed the police were on their way, when defendant fled. The victim was hospitalized for seven days; suffered numerous, serious injuries to his facial bones, his teeth, and his brain; and underwent surgery for those injuries. Thus, the court's implicit determination that defendant's beating of the victim was not "substantially less serious than the circumstances typically present in other cases" was within its discretion.

Likewise, the court's implicit determination that defendant did not commit the offenses "under circumstances of great provocation, coercion, or duress not amounting to a defense" was also within its discretion. There was no admissible evidence James had keyed defendant's car. The testimony established only that words directed at defendant by James and the victim were the initiating factors of defendant's acts of violence against them.

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provocation, coercion, or duress was supported only by her hearsay assertion that James, not the victim, had keyed defendant's car, but the preliminary hearing transcript does not support this assertion. Even if James had keyed defendant's car, the court acted within its discretion in determining that Chalgujian's testimony that defendant was set off and just reacted to the information that James was the individual responsible did not support a determination that he was coerced into attacking the victim in such a vicious manner.

The only factor which would support a determination that the case was unusual was that defendant was young and had no prior criminal record.[14] However, the seriousness of the offenses and the circumstances under which they occurred were more than sufficient for the court to find that these were not offenses which were atypical or that defendant's moral blameworthiness was reduced such that it should consider granting defendant probation.

Indeed, defendant repeatedly attempted to blame others and dispel any responsibility for the incident. Defendant "stated that the victim was partially responsible for much of the tension leading up to the altercation." Defendant reported that once the fight started, defendant feared for his life and was defending himself, first against James and then against the victim. Defendant stated James started the fight in the garage; defendant denied punching James. Defendant said James tried to kill him. Officers noted defendant accepted no responsibility for the attack and was "'completely callous as he displayed no remorse about the heinous crime he committed.'" Defendant expressed an unwillingness to pay restitution to the victim. Thus, the court acted within its discretion in finding that defendant had not overcome the statutory presumption against granting probation or, that even if he had, the circumstances were not such that the court should grant defendant probation.

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[14] In Sheetz' pre-plea report, he argued the case was unusual in that the crimes were committed because of a mental health condition, but Sheetz never indicted what the mental health condition was. Chalgujian, who testified she had been treating defendant for years, never testified defendant suffered from any mental health condition.

III. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
Acting P. J.

We concur:

SLOUGH
J.

FIELDS
J.